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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-25

BERNADINE ROSE BROKENLEG,

Petitioner,

v.

BERNARD C. BUTTS, SR., *et ux.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS OF THE STATE OF TEXAS, EL PASO

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TABLE OF CONTENTS

Page

OPINIONS BELOW 1

JURISDICTION 2

QUESTIONS PRESENTED 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 3

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT

I. The Decision of the Texas Court of Civil Appeals Conflicts with this Court's Rulings in *Stanley v. Illinois* and *Quilloin v. Walcott* that A Fit Parent Is Entitled to the Custody of Its Child. 8

II. The Decision of the Courts Below to Deny Petitioner the Custody of Her Child Is Grounded on Findings of Fact that are Constitutionally Impermissible According to Applicable Decisions of this Court. 11

III. The Preponderance of the Evidence Standard Used By the Courts Below to Deny A Fit Parent Custody of Her Child Is Not in Accordance with Applicable Decisions of this Court 15

CONCLUSION 17

Constitutional and Statutory Provisions Involved . . . . . Appendix A

Texas Supreme Court Order . . . . . Appendix B

Texas Court of Civil Appeals, Judgment, and Opinion Order on Motion for Rehearing . . . . . Appendix C

District Court Findings of Fact and Conclusions of Law and Decree of Termination . . . . . Appendix D

TABLE OF AUTHORITIES

Cases:

Alsager v. District Court, 406 F.Supp. 10 (S.D. Iowa 1975), aff'd, 545 F.2d 1137 (CA8 1976) 16

Bolling v. Sharpe, 347 U.S. 497 (1954) 13

Broadrick v. Oklahoma, 413 U.S. 601 (1973) 9

Cases, continued: Page

Brokenleg v. Butts, 559 S.W.2d 853 (Tex.Civ. App.—El Paso 1977) 2, 6, 7, 8, 10
Brown v. Board of Education, 347 U.S. 483 (1954) 13
Cafeteria and Restaurant Workers Union v. McElroy, 367 U.S. 886 (1961) 16
Carey v. Population Services International, 431 U.S. 678 (1977) 14
Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1974) 12, 14
Compos v. McKeithen, 341 F.Supp. 264 (E.D.La. 1973) 13
Dunn v. Blumstein, 405 U.S. 330 (1972) 9, 13, 14
Goidberg v. Kelly, 397 U.S. 254 (1970) 16
Grayned v. City of Rockford, 408 U.S. 104 (1972) 9
In re Winship, 397 U.S. 358 (1970) 15, 16
Korematsu v. United States, 323 U.S. 214 (1944) 13
Loving v. Virginia, 388 U.S. 1 (1967) 13
Lynch v. Baxley, 386 F.Supp. 378 (M.D.Ala. 1974) 17
Meyer v. Nebraska, 262 U.S. 390 (1923) 14
Moore v. City of East Cleveland, Ohio, 431 U.S. 494 (1977) 14, 15
Oregon v. Mitchell, 400 U.S. 112 (1970) 14
Pierce v. Society of Sisters, 268 U.S. 510 (1925) 14
Prince v. Massachusetts, 321 U.S. 158 (1944) 14
Quilloin v. Walcott, ____U.S. ____, 54 L.Ed.2d 511 (1978) 9, 10, 17
Roe v. Conn, 417 F.Supp. 769 (M.D.Ala. 1976) 13

Cases, continued: Page

Roe v. Wade, 410 U.S. 113 (1973) 9
San Antonio School District v. Rodriguez, 411 U.S. 1 (1973) 13
Shapiro v. Thompson, 394 U.S. 618 (1969) 14
Shelton v. Tucker, 364 U.S. 479 (1960) 9
Sims v. State Department of Public Welfare of the State of Texas, 438 F.Supp. 1179 (S.D. Tex. 1977) 16
Smith v. Organization of Foster Families for Equality and Reform, 431 U.S. 816 (1977) 10
Stanley v. Illinois, 405 U.S. 645 (1972) 9, 10, 12, 17
Wisconsin v. Yoder, 406 U.S. 205 (1972) 14
Woodby v. Immigration and Naturalization Service, 385 U.S. 276 (1966) 17
Zablocki v. Redhail, ____U.S. ____, 54 L.Ed.2d 618 (1978) 14

Constitution, Statutes and Rules:

Texas Rules of Civil Procedure
Rule 324 5
Rule 374 5
Rule 483 8
United States Constitution Fourteenth Amendment. . . . . *passim*
28 U.S.C. 1257 2
28 U.S.C. 2101 2
V.T.C.A. Family Code
§ 11.15 . . . . . 3, 4, 15
§ 14.01 . . . . . 3, 9
§ 14.02 3
§ 14.03 . . . . . 3, 9
§ 14.04 3
§ 14.07 3
§ 14.08 . . . . . 3, 10, 11
§ 15.02 . . . . . 3, 8
§ 15.05 . . . . . 3, 9

Articles: Page

Smith, Termination of the Parent-Child Relationship, 5 Tex.Tech.L.R. 437 (1974) 3, 10

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No.

BERNADINE ROSE BROKENLEG,

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS OF THE STATE OF TEXAS, EL PASO

Petitioner, Bernadine Rose Brokenleg, respectfully prays that a Writ of Certiorari be granted to review the judgment and opinion of the Texas Court of Civil Appeals, El Paso, entered in this case on November 16, 1977.

OPINIONS BELOW

The order of the Texas Supreme Court refusing Petitioner's application for a writ of error is unreported. It is printed in Appendix B. The opinion of the Texas Court

of Civil Appeals, El Paso is reported at 559 S.W.2d 853 (1977) and is printed in Appendix C. The judgment and the order overruling Petitioner's motion for a rehearing of the Texas Court of Civil Appeals, El Paso are unreported. They are also printed in Appendix C. The Findings of Fact and Conclusions of Law and Decree of Termination (judgment) of the Texas 109th Judicial District Court are unreported. They are printed in Appendix D.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. 1257(3). The order of the Supreme Court of the State of Texas refusing Petitioner's application for a writ of error was entered on April 5, 1978. In accordance with 28 U.S.C. 2101(c), this petition for a writ of certiorari is due on or before July 5, 1978. The judgment sought to be reviewed was dated and entered on November 16, 1977. Rehearing was denied on December 21, 1977.

QUESTIONS PRESENTED

I.

WHETHER A FIT PARENT CAN BE DENIED THE CUSTODY OF A CHILD FOR THE SOLE REASON THAT THE AWARD OF CUSTODY TO A NON-PARENT IS THOUGHT TO BE IN THE CHILD'S BEST INTEREST.

II.

WHETHER A FIT PARENT CAN BE DENIED THE CUSTODY OF A CHILD BECAUSE (1) THE PARENT WOULD RAISE THE CHILD ON AN INDIAN RESERVATION, AND (2) A CHILD WITH NON-INDIAN PHYSICAL FEATURES SHOULD NOT BE RAISED IN AN ENVIRONMENT CONSISTING OF PRIMARILY INDIAN PEOPLE.

III.

WHETHER A FIT PARENT CAN BE DENIED THE CUSTODY OF A CHILD ON EVIDENCE SUPPORTED BY ONLY A MERE PREPONDERANCE OF THE EVIDENCE.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution and V.T.C.A. Family Code §§ 11.15, 14.01 (a), (b), 14.02(a), (b), 14.03, 14.04, 14.07(a), 14.08, 15.02, and 15.05 are set out in Appendix A at pp. 1a-7a.

STATEMENT OF THE CASE

Bernadine Rose Brokenleg, the Petitioner, is the natural mother of Tiffany Lynette Butts, an eight-year-old child. Bernard C. Butts, Sr. and his wife Ila Marie Butts, Respondents, are Tiffany's paternal grandparents. Tiffany was born during Petitioner's marriage to Bernard C. Butts, Jr., Tiffany's natural father. Tiffany is Petitioner's only child. Petitioner had continuous custody of Tiffany from birth until Tiffany was approximately four years old. Petitioner had sole custody of Tiffany for most of this four-year period.

Petitioner and her child are enrolled members of the Rosebud Sioux Tribe of Indians of South Dakota. Respondents are non-Indian.

On April 24, 1975, Respondents petitioned the 109th Judicial District Court of Winkler County, Texas to terminate the parental rights of Petitioner and Bernard C. Butts, Jr. to Tiffany. The petition alleged that Petitioner abandoned and neglected Tiffany in the terms of V.T.C.A. Family Code § 15.02(1)(B), (E) and (F).[1] The petition also alleged that it would be in Tiffany's best interest to terminate parental rights and appoint Respondents as Tiffany's managing conservators. See V.T.C.A. Family Code §§ 15.02(2) and 15.05(b).

[1] Eugene L. Smith, one of the drafters of the Texas Family Code, states that § 15.02(1)(B) describes conduct of abandonment and that §§ 15.02(1)(E) and (F) concern neglect of the child. 5 Tex.Tech.L.R. 437, 439-440.

Under V.T.C.A. Family Code § 11.15 Respondents were required to prove these allegations by only a preponderance of the evidence.

On November 8, 1976, the District Court held a hearing on the petition. At the hearing, the Court stated that Petitioner's fitness as a mother was not in question. Statement of Facts, p. 101. On December 3, 1976 the District Court entered a decree terminating the parental rights of Petitioner and Bernard C. Butts, Jr. to Tiffany. The decree also appointed Respondents as Tiffany's managing conservators.

In its decree, the Court found that Petitioner engaged in the conduct defined in V.T.C.A. Family Code § 15.02 (1)(B) and (F), and that termination of Petitioner's parental rights and the appointment of Respondents as Tiffany's managing conservators were in Tiffany's best interest.

On January 17, 1977, the District Court overruled Petitioner's motion for a new trial.

On February 22, 1977, the District Court entered findings of fact and conclusions of law. Excepting findings of fact 6 and 7, the findings of fact and conclusions of law essentially reiterated the findings contained in the decree of termination.

Findings of fact 6 and 7 state that (1) to return Tiffany to Petitioner's custody would mean that Tiffany would be raised on an Indian reservation; (2) to raise Tiffany on an Indian reservation would be detrimental to and endanger her physical and emotional well-being; (3) Tiffany has non-Indian physical features; (4) to raise Tiffany in "an environment consisting of primarily Indian people would subject her to being reared under unnatural conditions that would be detrimental and endanger her emotional well-being."

Bernadine Rose Brokenleg appealed, assigning as error,[2] *inter alia*, the District Court's determination that the parental rights of a fit parent can be terminated and a fit parent denied the custody of a child; and the failure of the District Court to apply a clear and convincing evidence standard. In addition, the District Court's reliance on findings of fact 6 and 7 to support its judgment was made a point of error in Petitioner's brief on appeal.[3]

On November 16, 1977, the Court of Civil Appeals of Texas, El Paso filed its opinion and entered its judg-

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[2]Rule 374 of the Texas Rules of Civil Procedure provides, *inter alia*, that "the motion for new trial . . . shall constitute the assignments of error on appeal or writ of error." All of Petitioner's points of error, except those pertaining to the District Court's findings of fact 6 and 7, were included in Petitioner's original motion for a new trial. See Transcript, pp. 67, 70, 72, 82, 83. Except for issues raised by findings of fact 6 and 7, the issues of error were actually first raised, in substance, in Petitioner's written trial summation argument offered immediately following the close of evidence. See Transcript, pp. 33-34. All of Petitioner's points of error on the federal questions raised in this Petition were argued in Petitioner's brief on appeal.

[3]The error involving the District Court's findings of fact 6 and 7 were first raised in Petitioner's brief on appeal to the Texas Court of Civil Appeals. Rule 374 of the Texas Rules of Civil Procedure provides, *inter alia*, that "complaint of the action of the court on all matters arising under circumstances where no motion for new trial is required by these rules, if relied upon on appeal, shall be included in the statement of points in the brief as hereinafter provided, and in such cases no assignments of error shall be necessary." Rule 324 of the Texas Rules of Civil Procedure provides, *inter alia:* ". . . nor shall a motion for new trial be required in a non-jury case or in a case where the appeal is based upon some error of the trial court arising after its action upon the motion for new trial." The trial in the District Court below was a non-jury trial. Petitioner's motion for new trial was overruled on January 17, 1977. The findings of fact and conclusions of law were rendered by the District Court on February 22, 1977. The issues of error raised by findings of fact 6 and 7 were first expressed by the District Court in the findings of fact.

ment reversing that part of the District Court judgment terminating the parent-child relationship between Petitioner and Tiffany. The Court of Civil Appeals affirmed that part of the District Court judgment awarding custody of Tiffany to Respondents. The Court found no evidence that Petitioner is an unfit mother but concluded that Respondents' custody of Tiffany is nevertheless in the child's best interest.[4] The Court ruled that "even though there is no proof or finding of unfitness on the part of the parent to remain as a parent," the fit parent can be deprived of custody on a finding that non-parental custody is in the best interest of the child. 559 S.W.2d at 857.

The Court of Civil Appeals declined to rule on Petitioner's point of error that because her right to Tiffany's custody is a fundamental liberty safeguarded by the United States Constitution, Texas is required to use a means less drastic than a denial of custody to further its interest in protecting Tiffany's welfare.[5] The Court further declined to rule on Petitioner's point of error that by preventing a fit parent from exercising her constitutional right to the custody of her child,[6] the District Court's application of V.T.C.A. Family Code § 15.05(c) was overbroad.

[4]Affirmance of the District Court managing conservatorship appointment is implicit in the Court of Civil Appeals' opinion and explicit in its judgment.

[5]The Court stated that it would decline to rule on this point of error. In ruling that a fit parent can be denied custody, the Court did, in effect, rule on the point. The point of error regarding "least drastic means" was implicitly raised in Petitioner's trial summation argument and was first assigned as error in Petitioner's original motion for a new trial. See Transcript, pp. 67, 70. The error was also argued in Petitioner's brief on appeal.

[6]The overbreadth point of error was assigned as error in Petitioner's original and amended motion for a new trial and argued in the brief on appeal. See Transcript, pp. 67, 70, 72, 82, 83.

The Court also declined to rule on Petitioner's point of error that V.T.C.A. Family Code § 11.15 violates the due process of the law because it requires only a preponderance of the evidence standard in suits affecting the parent-child custody relationship.[7]

The Court of Civil Appeals made no express rulings on Petitioner's points of error regarding the District Court's findings of fact 6 and 7.[8]

On December 21, 1977, the Court of Civil Appeals denied Petitioner's motion for a rehearing.

Petitioner applied to the Supreme Court of the State of Texas for a writ of error from that part of the Court of Civil Appeals' judgment which affirmed the District Court custody award and appointed Respondents as Tiffany's managing conservators. The application assigned as error, the Court of Civil Appeals' express and implied rulings that (1) a fit parent can be denied child custody for the sole reason that non-parental custody is thought to be in the child's best interest, (2) a fit parent can be denied the custody of a child because the parent would raise the child in an Indian environment on an Indian reservation, and (3) a judgment denying custody of a child to a fit parent can be based on a preponderance of the evidence.

[7]The standard of proof point of error was assigned as error in Petitioner's original motion for a new trial and argued in the brief on appeal. See Transcript, p. 72.

[8]The Court of Civil Appeals implicitly adopted the District Court's findings of fact 6 and 7 by affirming the District Court custody award as in the best interest of the child. Since the Court of Civil Appeals rejected all other District Court findings of fact, only findings of fact 6 and 7 remain and are the only findings relevant to the best interest issue.

On April 5, 1978, the Texas Supreme Court refused Petitioner's application for a writ of error and found no reversible error in the judgment and opinion of the Court of Civil Appeals.[9]

REASONS FOR GRANTING THE WRIT

I.

THE DECISION OF THE TEXAS COURT OF CIVIL APPEALS CONFLICTS WITH THIS COURT'S RULINGS IN STANLEY V. ILLINOIS AND QUILLOIN V. WALCOTT THAT A FIT PARENT IS ENTITLED TO THE CUSTODY OF ITS CHILD.

The Texas Court of Civil Appeals held that "even though there is no proof or finding of unfitness on the part of the parent," the parent can be denied custody of a child for the sole reason that the award of custody to a non-parent is in the child's best interest. 559 S.W.2d at 857-858.[10] This holding is completely inconsistent

[9] Rule 483 of the Texas Rules of Civil Procedure provides, *inter alia*, that "In all cases where the Supreme Court is not satisfied that the opinion of the Court of Civil Appeals in all respects has correctly declared the law, but is of the opinion that the application presents no error which requires reversal, the Court will deny the application with the notation 'Refused. No Reversible Error'."

[10] The Texas District Court apparently based its best interest determination on findings that Petitioner abandoned and neglected her child in the terms of V.T.C.A. Family Code § 15.02(1)(B) and (F), and that, if the child were to be raised on an Indian reservation, there would be danger to its well-being. See Findings of Fact and Conclusion of Law, Appendix D, pp. 22a-24a.

The Court of Civil Appeals rejected all of the District Court's abandonment and neglect findings but nevertheless affirmed the District Court custody award on the ground that Respondents have "a more stable home" than Petitioner, 559 S.W.2d at 857, a "fact" not expressed by the District Court. The Court of Civil Appeals offers no explanation of the evidence relied on to support its comparison of the stability of Petitioner's and Respondents' respective homes, nor does the Court find that Petitioner's home is

[footnote continued]

with the decisions of this Court in *Stanley v. Illinois*, 405 U.S. 645 (1972) and *Quilloin v. Walcott*, ____ U.S. ____, 54 L.Ed.2d 511 (1978).[11]

In *Stanley*, the Court ruled, in effect, that parents are constitutionally entitled to a determination of unfitness

unstable or that Petitioner is unable to "provide for the physical, mental, and spiritual needs of Tiffany." *Id.*

The Court of Civil Appeals' best interest determination leads to the inescapable conclusion that the Court has merely sought to compare Petitioner's and Respondents' respective home environments and found a more delicate way to express the District Court's Findings of Fact 6 and 7. Consistent with *Stanley* and *Quilloin*, Petitioner's "essential" and "basic civil right" to raise her child cannot be abrogated on a mere insubstantial, and unsubstantiated comparison of the stability of the parental and a non-parental home.

Comparatively, there is always "a more stable home" for any child. Absent findings of neglect, abuse, or dependency, or other unfitness, the Due Process Clause requires the award of custody to a parent even if the parental home is not the optimum environment for the child.

[11] The holding is also inconsistent with the instruction of this Court that even when a compelling state interest justifies interference with the exercise of fundamental rights, the state must use the least drastic means to accomplish its end. *Roe v. Wade*, 410 U.S. 113, 155 (1973); *Dunn v. Blumstein*, 405 U.S. 330, 343 (1972); *Shelton v. Tucker*, 364 U.S. 479, 488 (1960). The least drastic means test required the courts below to seek a means to achieve parental custody. V.T.C.A. Family Code Chapter 14 offers less drastic means than the appointment of Respondents as managing conservators. These include the appointment of Petitioner as a managing conservator under § 14.01, or as a possessory conservator under § 14.03, or the issuance of another order under § 15.05(c).

The Court of Civil Appeals' holding reveals that V.T.C.A. Family Code § 15.05(c) is overbroad on its face and as applied. The statute sweeps within its prohibitions parental conduct and home environment circumstances which are not constitutionally or statutorily prohibited and deters Petitioner's exercise of her constitutional right to the custody of her child. *Broadrick v. Oklahoma*, 413 U.S. 601, 612-613 (1973); *Grayned v. City of Rockford*, 408 U.S. 104, 114-115 (1972).

before their children are removed from their custody. 405 U.S. at 658.[12] A finding of unfitness must be supported by proof of neglect. *Id.* Here, as in *Stanley*, there is nothing in the record indicating that Petitioner is or has been a neglectful parent. 559 S.W.2d at 857-858.

In *Quilloin*, the Court held:

> We have little doubt that the Due Process Clause would be offended '[i]f a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the children's best interest'. 54 L.Ed.2d at 520.

Accord, Smith v. Organization of Foster Families for Equality and Reform, 431 U.S. 816, 862-863 (1977) (Stewart, J. concurring, with whom Burger, C.J., and Rehnquist, J., joined.)

The Texas Court of Civil Appeals has ruled that petitioner is fit but that the best interest of the child, standing as the sole reason, supports the conclusion that Petitioner should be denied custody.[13] 559 S.W.2d at 858.

[12] According to Eugene L. Smith, one of the drafters of the Texas Family Code, the purpose of Chapter 15 is to authorize non-parental "permanent control of a child when the parents are unfit because of abandonment, abuse, or neglect." 5 Tex.Tech.L.R. 437, 438. The Court of Civil Appeals' ruling is inconsistent with this purpose.

[13] The denial of custody to Petitioner and the appointment of Respondents as managing conservators virtually constitutes a *de facto* termination of parental rights. Under V.T.C.A. Family Code § 14.08(c)(1), in order to obtain possession of or *any access* to her child, Petitioner must prove that "the circumstances of the child or parent have so materially and substantially changed since the entry of the [managing conservatorship] order . . . that the retention of the present managing conservator would be injurious

[footnote continued]

II.

THE DECISION OF THE COURTS BELOW TO DENY PETITIONER THE CUSTODY OF HER CHILD IS GROUNDED ON FINDINGS OF FACT THAT ARE CONSTITUTIONALLY IMPERMISSIBLE ACCORDING TO APPLICABLE DECISIONS OF THIS COURT.

The Texas District Court decision to appoint Respondents as the managing conservators of Petitioner's child was based entirely on findings of fact 6 and 7.[14] Essentially, the District Court found that to be raised in an Indian populated environment on an Indian reservation was not in Tiffany's best interest. The Court of Civil Appeals agreed.[15] The findings are not based on any evidence adduced at trial.

Substantial infringements of constitutional rights inhere in the District Court findings of fact 6 and 7.

to the welfare of the child and that the appointment of the new managing conservator would be a positive improvement for the child." As a prerequisite to a § 14.08 hearing to change the designation of managing conservator, Petitioner must allege and substantiate "that the child's present environment may endanger his physical health or significantly impair his emotional development." V.T.C.A. Family Code § 14.08(d)(1) and (e). And, the modification of a managing conservatorship order is wholly in the discretion of the court regardless of the evidence adduced at a modification hearing.

Section 14.08 clearly imposes an extraordinary, if not impossible, burden of proof on a fit parent petitioning a court for possession of or access to a child currently in the custody of a non-parent managing conservator. The burden violates Petitioner's custody right under the Due Process Clause.

[14] The Court of Civil Appeals found no evidence to support any of the other District Court findings.

[15] See footnote 10, *supra*.

Implicit in findings of fact 6 and 7 is a finding that Petitioner's custody of Tiffany would cause no detriment or endangerment to the child if Petitioner would raise the child away from an Indian reservation and away from an Indian community.

Findings of fact 6 and 7 deny Petitioner the equal protection of the laws. The findings operate automatically and arbitrarily. If a child, even an Indian child like Tiffany, is to be reared by its parent on an Indian reservation, a conclusive presumption arises that there will be detriment and danger to the physical and emotional well-being of the child. Conversely, the findings also conclusively presume that physical and emotional benefit will automatically inure to a child raised in a community where the primary population group racially resembles the child. Thus, the findings automatically foreclose parental custody when the parent chooses to raise a child on an Indian reservation, especially when that child has non-Indian physical features. These conclusive presumptions preclude inquiry into the individual circumstances of the parent and the best interest of a particular child. Such a situation is repugnant to the Equal Protection Clause.[16] *Stanley v. Illinois, supra,* 405 U.S. at 655-656.

The conclusive presumption that to be raised on an Indian reservation is against the best interest of all children, and those with non-Indian physical features, in particular, is also repugnant to the Due Process Clause, since it must inevitably result in decisions contrary to the best interest of individual children. *Stanley v. Illinois, supra,* 405 U.S. at 653-655; *Cleveland Board of Education v. LaFleur,* 414 U.S. 632, 644-645 (1974). No compelling or substantial government interest supports the automatic withholding of a child from parental custody on the basis of the racial environment in which the parent resides and chooses to raise the child.

Finding of fact 7 also constitutes an invidious discrimination in violation of the Equal Protection Clause. The

[16] The arbitrariness and threat to the best interest of a child and to parental custody rights inherent in the presumption is emphasized by the fact, in evidence, that Petitioner raised her child for 15 months on the Rosebud Sioux Indian Reservation without any negative physical or emotional consequences to the child.

finding discriminates against parents who wish to raise on an Indian reservation their children, who have non-Indian physical features. Parents who wish to raise on an Indian reservation their children who have Indian physical features can apparently do so consistent with finding of fact 7. The fact that the same parents can bear children exhibiting different racial physical features serves to underscore that finding of fact 7 is based on racial considerations totally irrelevant to any legitimate purpose of the state to protect children from parental abuse or neglect.[17] *San Antonio School District v. Rodriguez,* 411 U.S. 1, 17 (1973); *Bolling v. Sharpe,* 347 U.S. 497, 499 (1954); *Korematsu v. United States,* 323 U.S. 214, 216 (1944). When racial factors are decisive in the custody placement of a child, the law "promoted not the child's best interests but only the integrity of race" in the custody decision. *Compos v. McKeithen,* 341 F.Supp. 264, 267 (E.D.La. 1973). *Accord, Roe v. Conn,* 417 F.Supp. 769, 773, n.16 (M.D.Ala. 1976).

Discrimination in violation of the Equal Protection Clause is also integral to finding of fact 6. If, in order to secure the enjoyment of a right, disadvantageous burdens are placed entirely on one class or group that are not required of any other class or group, there is discrimination which denies the equal protection of the laws to the burdened group. *Dunn v. Blumstein, supra,* 405 U.S. at 342; *Brown v. Board of Education,* 347 U.S. 483 (1954). In order for Petitioner and other reservation resident Indian parents to secure the right to have custody of their children, finding of fact 6 requires them to reside in an off-Indian reservation location. No other group of

[17] Finding of fact 7 clearly will inhibit the freedom of Indians to marry interracially and thus bear interracial children. Upon divorce or other custody proceeding, the reservation resident Indian parent of an interracial child who has non-Indian physical features is automatically barred from custody. *Loving v. Virginia,* 388 U.S. 1 (1967).

parents is required to leave a locality or community of residence and reside in another location as a precondition to obtaining the custody of a child. No compelling or substantial government interest supports this precondition.

The residency requirement imposed on Petitioner by findings of fact 6 and 7 as a precondition to custody also abridges Petitioner's freedom of travel, a privilege of citizenship under the Fourteenth Amendment. Freedom of travel includes "freedom to enter and abide in any State in the Union." *Dunn v. Blumstein, supra,* 405 U.S. at 338. *Accord, Oregon v. Mitchell,* 400 U.S. 112, 285 (1970) (Stewart, J., concurring and dissenting, with whom Burger, C.J., and Blackmun, J., joined); *Shapiro v. Thompson,* 394 U.S. 618, 629-631 (1969). The freedom of travel obviously embraces the freedom to choose an abode in any area or region of a state, including on an Indian reservation.

The parental decision of where, in what way, and under what circumstances to raise a child is a most fundamental and personal liberty, long recognized as receiving protection under the Due Process Clause from unwarranted governmental intrusion. *Pierce v. Society of Sisters,* 268 U.S. 510, 535 (1925); *Meyer v. Nebraska,* 262 U.S. 390, 399 (1923). See also *Moore v. City of East Cleveland, Ohio,* 431 U.S. 494, 503-506 (1977); *Cleveland Board of Education v. LaFleur, supra,* 414 U.S. at 639-640; *Prince v. Massachusetts,* 321 U.S. 158, 166 (1944). Cf. *Wisconsin v. Yoder,* 406 U.S. 205, 217-219, 232 (1972). Recently the Court emphasized that parental child rearing decisions are part of a "right of personal privacy" protected by the Due Process Clause. *Carey v. Population Services International,* 431 U.S. 678, 684-685 (1977). See also *Zablocki v. Redhail,*

____ U.S. ____ , 54 L.Ed.2d 618, 629-631 (1978). Petitioner has a fundamental right to raise her child in the way of life of the Rosebud Sioux Indian society from which she and her child receive ethnic and cultural identity.

The Due Process Clause requires that "when the government intrudes on choices concerning family living arrangements . . . the importance of the governmental interests advanced and the extent to which they are served by the challenged regulation" must be examined. *Moore v. City of East Cleveland, Ohio, supra,* 431 U.S. at 499. The governmental interests advanced in V.T.C.A. Family Code Chapter 15 are the protection of children from parental abuse, abandonment, and neglect. These interests are not served by withholding the custody of a child from a fit parent for the reasons expressed in findings of fact 6 and 7 or for the home stability comparison reason expressed by the Court of Civil Appeals.[18]

III.

THE PREPONDERANCE OF THE EVIDENCE STANDARD USED BY THE COURTS BELOW TO DENY A FIT PARENT CUSTODY OF HER CHILD IS NOT IN ACCORDANCE WITH APPLICABLE DECISIONS OF THIS COURT.

The Texas Court of Civil Appeals and the District Court both used a preponderance of the evidence standard to support their respective custody decisions. The standard is required by V.T.C.A. Family Code § 11.15.

In re Winship, 397 U.S. 358 (1970), established that when a child faces loss of liberty for a law violation, due process requires that the facts against the child be proved beyond a reasonable doubt. *Winship* ruled that, although such proceedings are concerned with "a child's best

[18] See footnote 10, *supra.*

interest," the liberty right at stake requires the highest standard of proof. 397 U.S. at 367. Justice Harlan, concurring, explained that "the choice of the standard for a particular adjudication does . . . reflect a very fundamental assessment of the comparative social costs of erroneous factual determination." 397 U.S. at 370. *Accord, Cafeteria and Restaurant Workers Union v. McElroy*, 367 U.S. 886 (1961). The Court has further explained that "the extent to which procedural due process must be afforded . . . is influenced by the extent to which [an individual] may be 'condemned to suffer a grievous loss'." *Goldberg v. Kelly*, 397 U.S. 254, 262 (1970). The "social costs" and "grievous loss" of erring in the unnecessary dismemberment of a family are without parallel. They are far more severe than the consequences of continuing parental custody when a child might be better off separated from its parent. For this reason, and because the right of a parent to the custody and companionship of its child is fundamental, a standard of proof which permits the fact-finder to err on one side as easily as the other offends the very essence of the due process clause. *In re Winship, supra. Accord, Sims v. State Department of Public Welfare of the State of Texas*, 438 F.Supp. 1179, 1195 (S.D.Tex. 1977); *Alsager v. District Court*, 406 F.Supp. 10, 25 (S.D.Iowa 1975), aff'd on oth. grnds., 545 F.2d 1137 (CA8 1976). When a court must determine whether to remove a child from the custody of its parent for any period, but one of short duration in the event of an emergency, the interests at stake should require use of the beyond a reasonable doubt standard. Minimally, due process requires the intermediate clear and convincing evidence standard.[19] *Id.*

[19]Where, as here, significant constitutionally protected rights are at stake (e.g., deportation or involuntary civil commitment to a [footnote continued]

CONCLUSION

For the reasons set forth in this petition, Bernadine Rose Brokenleg, Petitioner, urges this Court to issue a writ of certiorari to the Court of Civil Appeals of Texas, El Paso and also to reverse summarily the custody decision of that Court and the District Court on authority of *Quilloin v. Walcott, supra,* and *Stanley v. Illinois, supra.*

Respectfully submitted,

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Attorney for Petitioner

mental hospital), the clear and convincing evidence standard is traditionally required. *Woodby v. Immigration and Naturalization Service*, 385 U.S. 276, 285 (1966); *Lynch v. Baxley*, 386 F.Supp. 378 (M.D. Ala. 1974).

APPENDIX

APPENDIX A

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

FOURTEENTH AMENDMENT, UNITED STATES CONSTITUTION,

Section 1. . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

V.T.C.A. FAMILY CODE

[56] § 11.15. Findings

The court's findings shall be based on a preponderance of the evidence under rules generally applicable to civil cases.

* * *

[68] Section 14.01 Court appointment of Managing Conservator

(a) In any suit affecting the parent-child relationship, the court may appoint a managing conservator, who must be a suitable, competent adult, or a parent, or an authorized agency. If the court finds that the parents are or will be separated, the court shall appoint a managing conservator.

(b) A parent shall be appointed managing conservator of the child unless the court finds that appointment of the parent would not [69] be in the best interest of the

child. In determining which parent to appoint as managing conservator, the court shall consider the qualifications of the respective parents without regard to the sex of the parent.

* * *

[96] § 14.02. **Rights, Privileges, Duties, and Powers of Managing Conservator**

(a) A parent appointed managing conservator of the child retains all the rights, privileges, duties, and powers of a parent to the exclusion of the other parent, subject to the rights, privileges, duties, and powers of a possessory conservator as provided in Section 14.04 of this code and to any limitation imposed by court order in allowing access to the child.

(b) A managing conservator who is not the parent of the child has the following rights, privileges, duties, and powers, subject to the rights, privileges, duties, and powers of a possessory conservator as provided in Section 14.04 of this code and to any limitation imposed by court order in allowing access to the child:

(1) the right to have physical possession of the child and to establish its legal domicile;

(2) the duty of care, control, protection, moral and religious training, and reasonable discipline of the child;

(3) the duty to provide the child with clothing, food, shelter, and education;

(4) the right to the services and earnings of the child;

(5) the power to consent to marriage, to enlistment in the armed forces of the United States, and to medical, psychiatric, and surgical treatment;

(6) the power to represent the child in legal action and to make other decisions of substantial legal significance concerning the child;

[97] (7) the power to receive and give receipt for periodic payments for the support of the child and to hold or disburse these funds for the benefit of the child; and

(8) if the parent-child relationship has been terminated with respect to the parents, or only living parent, or if there is no living parent, the power to consent to the adoption of the child and to make any other decision concerning the child that a parent could make.

* * *

[99] § 14.03. **Possession of and Access to Child**

(a) If a managing conservator is appointed, the court may appoint one or more possessory conservators and set the time and conditions for possession of or access to the child by the possessory conservators and others.

(b) On the appointment of a possessory conservator, the court shall prescribe the rights, privileges, duties, and powers of the possessory conservator.

(c) The court may not deny possession of or access to a child to either or both parents unless it finds that parental possession or access is not in the best interest of the child and that parental possession or access would endanger the physical or emotional welfare of the child.

(d) The court may grant reasonable visitation rights to either the maternal or paternal grandparents of the child and issue any necessary orders to enforce said decree.

[103] § 14.04. **Rights, Privileges, Duties, and Powers of Possessory Conservator**

A possessory conservator has the following rights, privileges, duties, and powers during the period of possession, subject to any limitations expressed in the decree:

(1) the duty of care, control, protection, and reasonable discipline of the child;

(2) the duty to provide the child with clothing, food, and shelter;

(3) the power to consent to medical and surgical treatment during an emergency involving an immediate danger to the health and safety of the child; and

(4) any other right, privilege, duty, or power of a managing conservator expressly granted in the decree awarding possession of the child.

* * *

[127] § 14.07. **Best Interest of Child**

(a) The best interest of the child shall always be the primary consideration of the court in determining questions of managing conservatorship, possession, and support of and access to the child. If the child is 14 years of age or older, he may, by writing filed with the court, choose the managing conservator, subject to the approval of the court.

(b) In determining the best interest of the child, the court shall consider the circumstances of the parents.

* * *

[52] CUMULATIVE ANNUAL POCKET PART FOR USE IN 1978

§ 14.08. **Modification of Order**

(a) A court order or the portion of a decree that provides for the support of a child or the appointment

of a conservator or that sets the terms and conditions of conservatorship for, support for, or access to a child may be modified only by the filing of a motion in the court having jurisdiction of the suit affecting the parent-child relationship. Any party affected by the order or the portion of the decree to be modified may file the motion.

* * *

[53] (c) After a hearing, the court may modify an order or portion of a decree that:

(1) designates a managing conservator if the circumstances of the child or parent have so materially and substantially changed since the entry of the order or decree to be modified that the retention of the present managing conservator would be injurious to the welfare of the child and that the appointment of the new managing conservator would be a positive improvement for the child; or

* * *

(d) If the motion is filed for the purpose of changing the designation of the managing conservator and is filed within one year after the date of issuance of the order or decree to be modified, there shall be attached to the motion an affidavit executed by the person making the motion. The affidavit must contain at least one of the following allegations along with the supportive facts:

(1) that the child's present environment may endanger his physical health or significantly impair his emotional development; or

(2) that the managing conservator is the person seeking the modification or consents to the modification, and the modification is in the best interest of the child.

(e) On the filing of a motion to which the provisions of Subsection (d) of this section apply, the court shall deny the motion and refuse to schedule a hearing unless the court determines, on the basis of the affidavit, that adequate facts to support an allegation listed in Subdivision (1) or (2) of Subsection (d) of this section are stated in the affidavit. If the court determines that the facts stated are adequate to support an allegation, a time and place for the hearing shall be set.

[73] CUMULATIVE ANNUAL POCKET PART FOR USE IN 1978

§ 15.02. Involuntary Termination of Parental Rights

A petition requesting termination of the parent-child relationship with respect to a parent who is not the petitioner may be granted if the court finds that:

(1) the parent has:

* * *

(B) voluntarily left the child alone or in the possession of another not the parent without expressing an intent to return, without providing for the adequate support of the child, and remained away for a period of at least three months; or

* * *

(E) engaged in conduct or knowingly placed the child with persons who engaged in conduct which endangers the physical or emotional well-being of the child; or

(F) failed to support the child in accordance with his ability during a period of one year ending within six months of the date of the filing of the petition;

* * *

(2) termination is in the best interest of the child.

* * *

[236] **§ 15.05. Decree**

(a) If the court finds grounds for termination of the parent-child relationship, it shall enter a decree terminating the parent-child relationship.

(b) If the court terminates the parent-child relationship with respect to both parents or to the only living parent, the court shall appoint a suitable, competent adult or authorized agency as managing conservator of the child. * * *

(c) If the court does not order termination of the parent-child relationship, it shall:

(1) dismiss the petition; or

(2) enter any order considered to be in the best interest of the child.

APPENDIX B

IN THE SUPREME COURT OF TEXAS
FROM WINKLER COUNTY, EIGHTH DISTRICT

No. B-7350

BERNADINE ROSE BROKENLEG,

v.

BERNARD C. BUTTS, SR., ET UX.,

Application of petitioner for writ of error to the Court of Civil Appeals for the EIGHTH Supreme Judicial District having been duly considered, and the Court having determined that the application presents no error requiring reversal of the judgment of the Court of Civil Appeals, it is ordered that said application be, and hereby is, refused.

It is further ordered that applicant BERNADINE ROSE BROKENLEG pay all costs incurred on this application.

I, GARSON R. JACKSON, Clerk of the Supreme Court of Texas, do hereby certify that the above and foregoing is a true and correct copy of the order of the Supreme Court of Texas in the case numbered and styled as above, as the same appears of record in the minutes of said Court under the dates shown.

WITNESS my hand and seal of the Supreme Court of Texas, at the City of Austin, this, the 9th day of June, 1978.

GARSON R. JACKSON, Clerk
/s/ By Richard P. Braun,
Deputy.
RICHARD P. BRAUN

APPENDIX C

COURT OF CIVIL APPEALS
EL PASO

No. 6638

BERNADINE ROSE BROKENLEG,
v.
BERNARD C. BUTTS, SR., ET UX.,
from Winkler.

JUDGMENT

This cause came on to be heard on the transcript of the record, and the same being inspected, because it is the opinion of this Court that there was error in that part of the judgment relating to the termination of the parent-child relationship between Respondent, Bernadine Rose Brokenleg, and the child, Tiffany Lynette Butts, it is therefore ordered, adjudged and decreed that that part of the judgment be reversed and this Court proceeded to render such judgment as to that part of the judgment as should have been rendered by the Court below, to-wit:

IT IS THEREFORE, on this 2nd day of December, 1976, ORDERED AND DECREED that the parent-child relationship between Respondent Mother, Bernadine Rose Brokenleg, and the child, Tiffany Lynette Butts, be, and the same is hereby, continued.

And because it is the opinion of this Court that there was no other error in the judgment except as herein reversed and rendered in part, it is therefore ordered,

adjudged and decreed that the judgment of the trial Court be in all other respects affirmed, in accordance with the opinion of this Court.

It is further ordered, adjudged and decreed by this Court that the appellant, Bernadine Rose Brokenleg, and the appellees, Bernard C. Butts, Sr., and wife, Ila Marie Butts, each pay one-half (½) of all costs in this behalf expended and incurred, both in this Court and in the Court below, for which let execution issue, and this decision be certified below for observance.

COURT OF CIVIL APPEALS
EL PASO

No. 6638

BERNADINE ROSE BROKENLEG,
Appellant,
v.
BERNARD C. BUTTS, SR., ET UX.,
Appellees.

APPEAL FROM THE DISTRICT COURT OF
WINKLER COUNTY, TEXAS.

OPINION

This appeal is from a judgment terminating the parental rights of a father and mother and awarding custody of their seven-year-old daughter to her paternal grand-

parents. The father voluntarily relinquished his rights to the child and there being no appeal from that part of the judgment terminating his rights, that part of the judgment has become final. The mother appeals from that part of the judgment terminating her rights and as to that part of the judgment we reverse and render. We affirm that part of the judgment which finds that the best interest of the child will be served by appointing the grandparents as managing conservators.

The marriage between Bernard C. Butts, Jr., and Bernadine Rose Brokenleg was annulled when their only child, Tiffany, was eighteen months old. The mother and child continued to live in California for several months and then in May, 1972, they moved to Parmelee, South Dakota, and since that time Bernadine has lived on the Rosebud Sioux Indian Reservation, she being a full-blooded Sioux Indian. In July, 1973, Mr. and Mrs. Bernard C. Butts, Sr., Appellees, and their son, Bernard C. Butts, Jr., went to South Dakota and visited Bernadine and Tiffany, whom they had asked to go with them on their vacation. Bernadine was unable to go but agreed that Tiffany could go with her relatives. There is a dispute in the testimony as to whether or not the grandparents were going to keep Tiffany after the vacation or whether she was to be returned to her mother on the Reservation. In fact, the Appellees took Tiffany to their home in Kermit, Texas, following the vacation and she has lived with them since that time.

Bernadine visited her daughter in Kermit in December, 1973, again in December, 1975, and in August, 1976. She also called and talked to Tiffany on the telephone several times each year, wrote to her occasionally, and left $50.00 for her support on the last visit. Bernadine was employed as a secretary at $2.00 per hour from November, 1973, until April, 1974. She was unemployed until

going to work as a teacher's aide at $2.30 per hour in August, 1974, although there is some evidence in the record that that job did not begin until February, 1975. Following an accident, she was unemployed from May, 1975, through August, 1975. At the time of trial, she was continuing to work as a teacher's aide and also earned $200.00 per month as a part-time tutor of college students.

Mr. Butts, Sr., is a production foreman for an oil company and his wife is circulation manager for a weekly newspaper. Together they earn over $2,000.00 per month. They have a home in Kermit in which Tiffany has her own bedroom. She is doing well in school and attends church regularly. She is well-fed and clothed and receives good medical attention when needed. Apparently, she is a happy, well-adjusted child, who testified in camera that she desires to stay with her grandparents.

Although Bernadine testified that she had adequate housing for her daughter on the Reservation, Appellees said the house was dirty and without adequate bathroom facilities which resulted in the need for an outhouse, and that when Tiffany was bathed, the dogs were in and out of the water. They testified that when they picked Tiffany up in July, 1973, she had a cold, tonsillitis, and ticks in her hair.

A psychiatrist testified that Bernadine was a competent mother and the best interest of a child would be served by placing custody with the mother. Two tribal officers testified in behalf of Bernadine and said she had a good reputation and that Tiffany was a normal child while living on the Reservation and would be well accepted now.

The trial Court filed findings of fact and conclusions of law. It found that Bernadine left Tiffany in the posses-

sion of her grandparents in July, 1973, without expressing an intent to return, and that Bernadine at no time provided adequate support, although having adequate financial resources to do so. It also found that it would be detrimental and would endanger the physical and emotional well-being of the child to return her to her mother's custody to be reared on the Indian Reservation. He concluded that Bernadine had voluntarily left the possession of the child with one not a parent without expressing an intent to return and without providing adequate support of the child, and that she remained away for a period of at least three months. It also concluded that she failed to support her child in accordance with her ability during a period of one year ending within six months of the date of the filing of the petition; and further that it would be in the best interest of the child to terminate the parental rights between Bernadine and Tiffany.

The Appellant attacks each of the trial Court's findings which serve as a basis for the judgment terminating the parental rights of the mother. The Appellees have filed no brief. The conclusions of law reflect that the trial Court has used both Section 15.02(1)(B) and (F)[1] as a basis for its decision. By her first point of error, Appellant attacks the findings made under Section 15.02(1)(B). As noted in Schiesser v. State, 544 S.W.2d 373 (Tex. 1976), there are four elements to this particular Section of the Family Code. They are: (1) voluntarily leaving the child; (2) without expressing an intent to return; (3) without providing for the adequate support of the child; and (4) remaining away for a period of at least three months. Of course, best interest of the child still remains an issue under Section 15.02(2). Although the Appellant attacks each of the findings as to the four elements mentioned above, we only need concern ourselves with the third one

[1] All Section references are to Texas Family Code.

which is a failure to provide for the adequate support of the child. As noted in the commentary following this Section of the Family Code in 8 Tex.Tech.L.Rev. 93 (1976), the standard for determining nonsupport under Subparagraph (B) is whether or not there is provision for adequate support of the child, rather than the parent's ability to support the child as in Subparagraph (F). The evidence in this case all reflects that the grandparents were able to and did in fact adequately support the child from the day Bernadine turned Tiffany over to them in July, 1973, until the date of trial. They testified themselves that they provided for all of her physical and medical needs and that she was well-fed, clothed, and in good health during the time she remained in their custody. Since the test under this Subparagraph is not whether or not the parent actually supported the child, but whether or not arrangements were made for the adequate support of the child, and the evidence is undisputed that they were, we conclude that Section 15.02(1)(B) is not applicable and we sustain Appellant's Point of Error No. I.

The second point of error attacks the trial Court's finding that Appellant failed to support her child in accordance with her ability during a period of one year ending within six months of the date of the filing of the petition under Section 15.02(1)(F). The petition was filed on April 21, 1975. Obviously, one year means twelve consecutive months. Thus, it was necessary that there be a period of twelve consecutive months sometime between October 21, 1973, and April 21, 1975, when the Appellant failed to provide support in accordance with her ability. The evidence is without dispute that during that entire period she made no contribution. But under the evidence as set forth above, we find no period of twelve consecutive months where she had an ability to contribute to the support of her child. Although she

worked from November, 1973, until April, 1974, without making any contribution, that period is far short of twelve consecutive months. If she did, in fact, go to work in August of 1974 and worked until April, 1975, the period of time is still short of twelve consecutive months. The evidence is without dispute that she was unemployed from April, 1974, at least until August, 1974, and perhaps even until February, 1975. There is no evidence that she had any ability to support her child during that period of time, and thus there are no twelve consecutive months for the period of one year during which she failed to support her child in accordance with her ability to do so as required by Section 15.02(1)(F). *Cawley v. Allums,* 518 S.W.2d 790 (Tex. 1975); *Wiley v. Spratlan,* 543 S.W.2d 349 (Tex. 1976).

Even if it should be determined that because of her earnings the Appellant had an ability to contribute to the support of her child for a period of one year ending within six months of the date of the filing of the petition in 1975, we conclude that under the holding in *Holley v. Adams,* 544 S.W.2d 367 (Tex. 1976), the mother's failure to support is excused. Of course, this issue of excuse must be considered under the holding in the *Holley* case under Section 15.02(2) in deciding the best interest of the child.

In the event we should be in error as to either of the first two points, we consider and sustain the third point of error which contends that the trial Court erred in finding that the best interest of the child requires termination of the parent-child relationship. The issue raises several difficult questions. First of all, we conclude that a parent-child relationship may be terminated even though there is no proof or finding of unfitness on the part of the parent to remain as a parent. Certainly,

this is the rule on the issue of custody. *Herrera v. Herrera,* 409 S.W.2d 395 (Tex. 1966); *Tiller v. Villasenor,* 426 S.W.2d 257 (Tex.Civ.App.—Houston [1st Dist.] 1968, no writ); *De Le Hoya v. Saldivar,* 513 S.W.2d 259 (Tex. Civ.App.—El Paso 1974, no writ). The same rule has been applied in cases involving termination of parent-child relationships. In the case of *In re R_D_P_* , 526 S.W.2d 135 (Tex.Civ.App.—Dallas 1975, no writ), the Court said:

> "Appellant contends that appellee has the burden of proving that the natural parent at the time of filing this action was an unfit parent. We cannot agree. Tex.Family Code Ann. Sec. 15.02 (Vernon 1975) places no such burden upon petitioner. Even precode decisions held that a court may terminate parental rights without finding that the parent is unfit, where it is in the best interest of the child. *McBrien v. Zacha,* 351 S.W.2d 101 (Tex.Civ.App.—Dallas 1961, writ ref'd n.r.e.); *Scozzari v. Curtis,* 398 S.W.2d 819 (Tex.Civ.App.—Fort Worth 1966, no writ)."

There are cases with language to the contrary. See *Hall v. Harris County Child Welfare Unit,* 533 S.W.2d 121 (Tex. Civ.App.—Houston [14th Dist.] 1976, no writ); and *D_F_ , v. State,* 525 S.W.2d 933 (Tex.Civ.App.—Houston [1st Dist.] 1975, no writ). But in *Holley v. Adams,* supra, and *Schiesser v. State,* supra, the Court makes no mention of such requirement and certainly the Statute does not indicate that "unfitness" is an issue in itself.

But in the *Holley* case, the Court lists eight factors which may, among others, be considered in deciding the best interest of the child. One of the factors listed is acts or omissions of the parent which may indicate that the existing parent-child relationship is not a proper one, and this would seem to include the element of "unfitness." The difficulty of the issue lies in part in the fact that

most of the factors listed have some equal application to both the issue of custody and the issue of termination. For instance, the first factor listed in that opinion is the desire of the child. In this case, the seven-year-old child testified in camera that she did not want to go with her mother but preferred to stay in Kermit. That may be strong evidence on the custody issue, but questionable evidence on the termination issue. Certainly, the child did not testify that she never wanted to see her mother again. Another listed element is stability of the home. Undoubtedly, the evidence shows greater stability in the home of the grandparents who are well able to provide for the physical, mental and spiritual needs of Tiffany, and based upon such evidence we agree that custody was properly placed in the grandparents. But does the fact that Appellees have a more stable home for the care and custody of Tiffany mean she should have all relationships with her mother terminated even though the mother has on other occasions visited her daughter in that stable home without any apparent problems arising at the time? On the issue of unfitness, the trial Court has made no findings and did not consider that to be an issue in the case. Certainly, the evidence in this case would not have supported any affirmative finding had one been made. Likewise, the record is void of evidence indicating that visitations upon the part of the mother in the past have created any emotional or physical dangers which call for termination of the parent-child relationship.

The facts in this case are somewhat similar to those in the *Holley* case where the financial support from the mother was practically nil, visitations seldom, but the ability to support much stronger. In that case, the Court said:

> "However, as previously noted, any excuse for this failure to support is to be considered under best

> interest. A comparison of the facts of this case to the circumstances of *Heard v. Bauman*, supra, leads to the conclusion that the failure to support was excused. In the instant case David Adams testified that Nanci Holley voluntarily agreed to give him custody of the child during the course of the divorce proceedings in order to assure that the child would be provided adequate financial support. Nanci Holley was never ordered to make support payments. It was undisputed that the child had been properly cared for while in his father's custody and that David Adams and his wife never sought or wanted any financial support for the child from Nanci Holley. Therefore, Nanci Holley's duty to support her child was excused and the fact that the failure to support is excused is one of the factors to be considered in ascertaining the best interest of the child."

As the Court noted in *Wiley v. Spratlan*, supra, there is a substantial difference between suits for conservatorship, possession and support of children, and those to terminate a parent-child relationship, and the difference in the proceedings justifies the caution with which Courts have characteristically considered termination cases. While we conclude that all of the factors listed as bearing on the best interest of the child in the Holley case support the trial Court's conclusion that custody should be awarded to the grandparents in this case, we also conclude that none of those factors compel termination of the mother's rights as being in the best interest of the child. The father's rights have been terminated. The grandparents have not testified as to any intention to adopt their granddaughter, no evidence has been offered that the mother is unfit, and we find no compelling reason to terminate "The natural right which exists

between parents and their children [and which] is one of constitutional dimensions." *Wiley v. Spratlan*, supra.

The foregoing makes it unnecessary for us to pass on the Appellant's last two points of error.

November 16, 1977 /s/ Max N. Osborn
MAX N. OSBORN,
Associate Justice.

COURT OF CIVIL APPEALS

EL PASO

No. 6638

BERNADINE ROSE BROKENLEG,

APPELLANT,

v.

BERNARD C. BUTTS, SR., ET UX.,

APPELLEES.

Appeal from the District Court
of Winkler County, Texas.

December 21, 1978. [sic] * This day came on to be heard appellant's motion for rehearing, and the Court having considered the same is of the opinion that the same should be overruled.

*This is a typographical error. It should read "December 21, 1977."

Wherefore, it is considered, adjudged and ordered that appellant's said motion for rehearing be, and the same is hereby, overruled.

THE STATE OF TEXAS)
)
COUNTY OF EL PASO)

I, ANNE D. RAY, Clerk of the Court of Civil Appeals in and for the Eighth Supreme Judicial District of Texas, do hereby certify that the foregoing on this page is a full, true and correct copy of the Court's Order, dated December 21, 1978, [sic] * overruling appellant's motion for rehearing in the foregoing entitled cause as the same now appears of record in Volume 17, at Page No. 139, of the Minutes of this Court.

IN WITNESS WHEREOF, I hereunto set my hand and affix the Seal of said Court at El Paso, this the 9th day of June, A.D. 1978.

ANNE D. RAY, CLERK

/s/ Martha S. Diaz, Deputy.

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*This is a typographical error. It should read "December 21, 1977."

APPENDIX D

NO. 8817

IN THE DISTRICT COURT OF
WINKLER COUNTY, TEXAS
109TH JUDICIAL DISTRICT

IN THE INTEREST OF
TIFFANY LYNETTE BUTTS,
A CHILD

FINDINGS OF FACT AND CONCLUSIONS OF LAW

In response to the request of Respondent in the above entitled and numbered cause, I hereby make the following as my Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1.

On either July 15, 1973, or July 17, 1973, Respondent left her child, Tiffany Lynette Butts, in the possession of Petitioners, who were not a parent of said child, without expressing an intent to return.

2.

At no time since Respondent left her child, Tiffany Lynette Butts, with Petitioners until the time of the trial of this cause, has such Respondent provided adequate support of said child, nor has she discussed the question of support with Petitioners.

3.

Respondent remained away from said child after voluntarily leaving such child in the possession of Petitioners on either July 15, 1973, or July 17, 1973, for a period in excess of three (3) months without providing adequate support for said child.

4.

Respondent has had adequate financial resources since leaving her child, Tiffany Lynette Butts, with Petitioners to contribute and provide for adequate support of said child.

5.

Respondent has had substantially the same financial resources available to her to contribute or to provide for the adequate support of her child, Tiffany Lynette Butts, at all times since August, 1974, that she had at the time of the trial of this cause.

6.

The minor child, Tiffany Lynette Butts, has expressed to the Trial Court in an en camera examination and the Trial Court finds that to return the child to Respondent's custody to be reared on an Indian Reservation would be detrimental and endanger the physical and emotional well-being of said child.

7.

The child has physical features, as observed by the Trial Court, of a non-Indian nature and her return to an environment consisting of primarily Indian people would subject her to being reared under unnatural conditions that would be detrimental and endanger her emotional wellbeing.

8.

Respondent has had all the available legal assistance, that she now has, at all times for the more than three

years that the child has been with the Petitioners to seek a return but the Respondent failed to do so until this suit was initiated.

CONCLUSIONS OF LAW

1.

Respondent knowingly left her minor child, Tiffany Lynette Butts, in the possession of Petitioners on either July 15, 1973, or July 17, 1973, without expressing an intent to return.

2.

Respondent left her minor child, Tiffany Lynette Butts, in the possession of Petitioners without providing for adequate support for said child.

3.

Respondent left her minor child, Tiffany Lynette Butts, in the possession of Petitioners, and remained away for a period of at least three (3) months.

4.

Respondent failed to support her minor child, Tiffany Lynette Butts, in accordance with her ability during a period of one year ending within six (6) months of the date of the filing of Petitioners' Petition.

5.

The termination of the parental rights between Respondent and her minor child, Tiffany Lynette Butts, is in the best interest of said child.

SIGNED AND RENDERED this 22d day of February, A.D. 1977.

/s/ Ken G. Spencer
Ken G. Spencer,
Judge Presiding

NO. 8817

IN THE DISTRICT COURT OF
WINKLER COUNTY, TEXAS
109TH JUDICIAL DISTRICT

IN THE INTEREST OF
TIFFANY LYNETTE BUTTS,
A CHILD

DECREE OF TERMINATION

On the 8th day of November, 1976, trial on the merits was held in this cause.

Petitioners, Bernard C. Butts, Sr., and wife, Ila Marie Butts, who reside at 527 N. Avenue C., Kermit, Winkler County, Texas, appeared in person and by attorney, John R. Lee.

Respondent Mother, Bernadine Ross [sic] Brokenleg, who resides on the Rose Bud [sic] Sioux Reservation near Parmelee, South Dakota, appeared in person and by her attorney, Bertram E. Hirsch.

Also appearing was Michael L. Fostel, P. O. Box 1015, Kermit, Texas, appointed by the Court as Guardian ad Litem of the child.

Respondent Father, Bernard C. Butts, Jr., did not appear, having theretofore [sic] duly and properly filed his unrevoked and irrevocable Affidavit of Relinquishment of Parental Rights as provided in Section 15.03, Texas Family Code.

The Court, after examining the pleadings, listening to the evidence and argument of counsel, finds that it has jurisdiction of this cause and the parties. It finds that no other Court has continuing exclusive jurisdiction of this cause at this time.

No jury was demanded, and all matters in controversy, including questions of fact and law, were submitted to the Court. All persons entitled to citation were properly cited.

The Court finds that Petitioners have requested termination of the parent-child relationship between Respondent Mother, Berandine Ross [sic] Brokenleg and Respondent Father, Bernard C. Butts, Jr.

The Court finds that the mother of the child has:

(1) voluntarily left the child alone or in the possession of another, not the parent, without expressing an intent to return;

(2) voluntarily left the child alone or in the possession of another not the parent without expressing an intent to return, without providing for the adequate support of the child and remained away for a period of at least three months;

(3) failed to support the child in accordance with her ability during a period of one year ending within six months of the date of the filing of this petition;

The Court further finds that:

Respondent Father executed an unrevoked or irrevocable affidavit of relinquishment of parental rights as provided in Section 15.03, Texas Family Code.

The Court finds that termination would be in the best interest of the child.

IT IS THEREFORE ORDERED AND DECREED that the parent-child relationship between Respondent Mother, Bernadine Ross [sic] Brokenleg and Respondent Father, Bernard C. Butts, Jr., and the child, Tiffany Lynette Butts, be and is hereby terminated.

The Court further finds that the best interest of the child will be served by appointing Bernard C. Butts, Sr., and wife, Ila Marie Butts, as Managing Conservators.

IT IS THEREFORE ORDERED AND DECREED THAT Bernard C. Butts, Sr., and wife, Ila Marie Butts, be and are hereby appointed Managing Conservators of the child.

SIGNED AND ENTERED this 2nd day of December, 1976.

/s/ Ken G. Spencer,
Ken G. Spencer,
Judge Presiding